LAU CHUN TSAO & ORS.

v.

SOO CHAI

SUPREME COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 416 OF 1985]
18 OCTOBER 1986

CIVIL PROCEDURE: *Appeal against summary order made under O. 81 of the Rules of the High Court 1980 to cancel transfer of land executed by contracting party to third party - Specific Relief Act 1950 - Section 36 - Specific performance or rescission only - Whether Judge has jurisdiction to make such order of cancellation where third party involved.*

This is an appeal against an order made under O. 81 of the Rules of the High Court 1980 that the transfer of land by the 2nd appellant to the 3rd appellant be cancelled pursuant to s. 36 of the Specific Relief Act 1950 ("the Act") and that the land be delivered, free from encumbrances and with vacant possession to the respondent within 14 days from the date of the order.

The 1st appellant, the original developer of Far East Garden Housing Estate, after having entered into a Sale and Purchase Agreement with one Chang Kon Fah for the purchase of a building Lot 52 and house to be erected on the said land, sold and transferred all his interests in Far East Garden Housing Estate on the said land to the 2nd appellant who thus acquired all liabilities and benefits of all Sale and Purchase Agreements between the 1st appellant and other purchases including Chang Kon Fah. Chang Kon Fah, on the other hand, assigned all his rights and interests in Lot 52 to the respondent who, in a Substituted Agreement, undertook all liabilities and obligations of Chang Kon Fah in the original agreement. The 2nd appellant transferred Lot 52 and the building thereon to his wife, the 3rd appellant, for love and affection. The 3rd appellant charged Lot 52 and the building thereon to Sabah Bank Berhad to secure an overdraft. Both interests were duly registered.

Counsel for the appellants contended that the learned Judge had erred in law in ordering the cancellation of the transfer by the 2nd appellant to the 3rd appellant as s. 36 of the Act speaks implicitly that "if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled," it makes no reference at all to any transfer executed by a contracting party in favour of a third person.

Held:

[1] Section 36 of the Act does not empower the Judge to order the cancellation of the transfer executed by the 2nd appellant to the 3rd appellant.

[2] However, the Court has the power and jurisdiction to make such an order under s. 26(b) of the Act but only after a trial and subject to the conditions therein.

[3] Since the exercise of the equitable remedy of specific performance is conditional on an order being made by the trial Judge under s. 26(b) the Court accordingly ordered that the whole of the order of the trial Judge be set aside and leave be given to the appellants to defend the action.

[Appeal allowed with costs.]

Case referred to:
Ong Chat Pang & Anor v. V. Chettiar [1971] 1 MLJ 224

Legislation referred to:
Rules of the High Court 1980, O. 81
Land Rules 1930 (Sabah), r. 25
Specific Relief Act 1950, ss. 26(b), 36

For the appellants - Cecil Ian Robertson; M/s. Skinner Lind Robertson Pang & Willie
For the respondent - Joseph Lee; M/s. Joseph Lee & Co.

JUDGMENT

George Seah SCJ:

This is an appeal against an order made under O. 81 of the Rules of the High Court 1980, whereby the learned Judge:

(a) Declared that the transfer of the land CL 015375461 by the 2nd defendant, Wong Kwok, to the 3rd defendant, Chen Si Mui alias Latifah Chen, is void and it is ordered that it be cancelled pursuant to s. 36 of the Specific Relief Act 1950;

(b) Ordered that the agreements mentioned in the statement of the claim be specifically performed by all the defendants and be carried into execution as follows:

(i) that the defendants do within fourteen days from the date of this order execute in favour of and deliver to the plaintiff a proper and registrable transfer of the said land, namely CL 015375461 free from encumbrances together with the Certificate required under r. 25 of the Sabah Land Rules 1930 failing which the Deputy Registrar of this Honourable Court be and is hereby empowered to execute the transfer of the said land to the plaintiff;

(ii) that all the defendants do deliver up vacant possession of the said land to the plaintiff within fourteen days from the date of this order;

(iii) that all the defendants to redeem the Charge registered as Memorial No. 10181362(06) in favour of Sabah Bank Berhad and all other encumbrances against the said land within fourteen days from the date of this order and

(iv) that all the defendants do pay the plaintiff damages for breach of contract to be assessed and costs to be taxed.

In the view which we take this appeal we need only to set out briefly the main facts in chronological order.

(a) The 1st appellant (1st defendant in the Court below) was the original developer of Far East Garden Housing Estate, Kota Kinabalu, Sabah. On 22 July 1974 he entered into a Sale and Purchase Agreement in writing with one Chang Kon Fah for the purchase of one building Lot 52 together with a 2-storey semi-detached house to be erected thereon on land held under CL 015375461. The agreed purchase price was to be RM72,000 of which a total of RM24,000 had been paid and received.

(b) On 2 March 1976 the 1st appellant sold and transferred all his interests in Far East Garden Housing Estate on land held under CL 015375461 to the 2nd appellant (2nd defendant in the Court below). Under the terms of the agreement the 2nd appellant acquired all the liabilities and benefits of all the Sale and Purchase Agreements entered into between the 1st appellant and the other purchasers including Chang Kon Fah.

(c) On 18 May 1977 a Substituted Agreement was entered into between Chang Kon Fah, the respondent (plaintiff in the Court below) and the 1st appellant whereby Chang Kon Fah assigned all his rights and interests in Lot 52 to the respondent for a consideration stated to be in the sum of RM24,000 and under Clause 5 the respondent "hereby binds himself legally liable and obligated to the terms and conditions under the name of the First Party (Chang Kon Fah) in the said original agreement". This Substituted Agreement was signed by the 2nd appellant as attorney for the 1st appellant.

(d) The 2nd appellant transferred Lot 52 and the building there-on to his wife, the 3rd appellant (3rd defendant in the Court below) for love and affection. It was dated 17 April 1980 but it was only registered at the Sabah Central Land Registry on 24 January 1981 *vide* Memorial No. 10178043.

(e) On 14 June 1981 the 3rd appellant charged Lot 52 and the building thereon to Sabah Bank Bhd. to secure an overdraft of RM500,000 in favour of Wong Kwok Contractors Sdn. Bhd., Kota Kinabalu, Sabah. This Charge was duly registered on 29 June 1981 *vide* Memorial No. 10181362.

The main point taken by learned Counsel for the appellants was that the learned Judge erred in law in ordering the cancellation of the transfer of the land held under CL 015375461 by the 2nd appellant, Wong Kwok, to the 3rd appellant, Chen Si Mui alias Latifah Chen. It was submitted that the learned Judge had misconstrued the provision of s. 36 of the Specific Relief Act 1950 (hereinafter referred to as the Act) which is in the following term:

> A plaintiff instituting a suit for specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

This section speaks implicitly that "if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled"; it makes no reference at all to any transfer executed by a contracting party in favour of a third person. We agree with the submission of learned Counsel for the appellants that this section does not empower the learned Judge to order the cancellation of the transfer executed by the 2nd appellant to the 3rd appellant. We are doubtful whether the learned Judge has jurisdiction to make such a summary order under O. 81 of the Rules of the High Court 1980 and without hearing full argument on the matter, we prefer to keep this point open for future decision. On the other hand, the Court appears to have the jurisdiction and power to make such an order under s. 26(b) of the Act but in our opinion, it should only do so after a trial and subject to the conditions contained therein (see *Ong Chat Pang & Anor. v. V. Chettiar* [1971] 1 MLJ 224). It seems to us that since the exercise of the equitable remedy of specific performance is conditional on the learned Judge making an order under s. 26(b) of the Act and in view of the unsatisfactory manner the facts were presented in the Court below where the long delay and non-execution of the Memoranda of Transfer and Charge had not been explained, we think the proper order to make is to set aside the whole of the Order of the learned Judge and give leave to the appellants to defend the action. The appeal is allowed with costs here and below to be taxed. The deposit to be refunded to the appellants. We further direct that the hearing of this action should be expedited.

Also found at [1987] 1 CLJ 242